LIABILITY OF CHARITABLE HOSPITALS FOR NEGLIGENCE OF THEIR EMPLOYEES. —Recent decisions in a few jurisdictions have cast some doubt upon the doctrine, supported by the great weight of authority in this country, which exempts a charitable hospital from liability for the negligent acts of its doctors and nurses, if it has not been negligent in selecting them and does not retain them after it has knowledge of their incapacity. In the case of *Mulliner* v. *Evangelisher Diakonniessenverein of Minnesota District of German Evangelical Synod of North America,* (Minn., 1920), 175 N. W. 699, a pay patient in a charitable hospital was killed due to the negligence of one of the nurses. Although it was not shown that the defendant had negligently hired or knowingly kept in its employ an incompetent person, nevertheless, *held,* the corporation was liable in damages for the negligence of its employee.

The first American case to announce this view was *Glavin* v. *Rhode Island Hospital,* 12 R. I. 411; but shortly after that decision was handed down, it was negatived by the Rhode Island legislature. See General Laws of Rhode Island (1896), pp. 538, 539. In 1915, the Supreme Court of Alabama arrived at the same result in *Tucker* v. *Mobile Infirmary Ass'n.,* 191 Ala. 572, which case now stands as the law in that jurisdiction.

One of the earliest United States decisions upon the question is *McDonald* v. *Mass. General Hospital,* 120 Mass. 432. The authority depended upon is the English case of *Holliday* v. *St. Leonard,* 11 C. B. (N.S.) 191. But it is to be noted that the principle of the *Holliday Case* was overruled by *Mersey Docks* v. *Gibbs,* L. R., 1 H. L. 93. And, in accord with the latter case, the modern English decisions have established the liability of charitable corporations in these cases. *Gilbert* v. *Trinity House,* L. R., 17 Q. B. D. 795; *Hillyer* v. *Governors of St. Bartholomew's Hospital,* L. R. 1909, 2 K. B. 820. The same rule is laid down by the Ontario Supreme Court in *Lavere* v. *Hospital,* 35 Ont. L. Rep. 98. In this country, the *McDonald Case* has been generally followed, and is repeatedly referred to as the leading case upon the question. 6 Cyc. 975; *Taylor* v. *Hospital,* 85 Ohio St. 90, 39 L. R. A. (N.S.) 427. See 5 MICH. L. REV. 552.

Although the very great weight of American authority favors the rule of exemption, the reasons given in support of the rule are by no means harmonious. There are three bases, upon one or more of which all the decisions rest. These we may call the "trust fund theory," the "public policy theory," and the "implied assent theory." They will be discussed in order.

The "trust fund theory" is to the effect that all funds of a charitable institution are held in trust for the particular charitable purpose, and that the payment of damages for injuries to patients and inmates due to the negligence of the employees of the institution is not a purpose contemplated by the trust, and that therefore the funds cannot be diverted to the payment thereof. The objection to this reasoning is that it proves too much. Followed to its logical conclusion, it would result in exempting such corporations from the payment of damages upon any claim. But a recovery for injuries is allowed by one not an inmate. *Basabo* v. *Salvation Army,* 35 R. I. 22, 42 L. R. A. (N.S.) 1144; *Van Ingen* v. *Jewish Hospital of Brooklyn,* 164 N. Y. Supp. 832; *Thomas* v. *German General Benevolent Society,* 168 Cal. 183; 5 RULING

CASE LAW 378. Also, many courts which exempt hospitals from liability for the negligent acts of their employees nevertheless hold them liable for negligence in hiring incompetent servants. *Hearns* v. *Waterbury Hospital,* 66 Conn. 98; *Van Tassell* v. *Manhattan Eye and Ear Hospital,* 15 N. Y. Supp. 620; *U. P. Ry. Co.* v. *Artist,* 60 Fed. 365; *Plant System, etc.* v. *Dickerson,* 118 Ga. 647; *Ry. Co.* v. *Buchanan,* 126 Ky. 288; *McDonald* v. *Mass. General Hospital, supra; Thornton* v. *Franklin Square House,* 200 Mass. 465. Such holdings are absolutely inconsistent with the trust fund theory. A number of the courts, although supporting the majority rule, nevertheless disapprove the trust fund theory as a basis for the exemption. *Bruce* v. *Central Methodist Episcopal Church,* 147 Mich. 230; *Hewitt* v. *Woman's Hospital Ass'n.,* 73 N. H. 556; *Horden* v. *Salvation Army,* 199 N. Y. 233, 32 L. R. A. (N.S.) 62. This doctrine is open to such serious doubt that it would seem to furnish no solid foundation for the rule.

The second theory relied upon is that public policy is opposed to applying the doctrine of *respondeat superior* to charitable hospitals. It is argued that the public has an interest in the maintenance of these institutions which minister to the sick and needy, and that therefore they should not be discouraged by subjecting them to claims for damages by those who seek their aid. The public is indeed interested in the continuance of these charities, "but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully." *Glavin* v. *Rhode Island Hospital, supra.* It is further urged that the doctrine of *respondeat superior* does not apply because the servant or agent is not acting for the profit of the master. It seems clear, however, that the liability for negligence of either a natural or an artificial person, by its own act or by agent, depends upon a failure to properly perform a duty imposed by law, regardless of whether money is made in the performance of that duty. *Gilbert* v. *Trinity House, supra.* If the public policy theory of exemption is sound, no reason appears why it should not be applied in cases where the person injured is not a patient or an inmate of the institution. And yet such persons have been allowed to recover for injuries received from negligent employees. *Basabo* v. *Salvation Army, supra; Van Ingen* v. *Jewish Hospital of Brooklyn, supra; Thomas* v. *German General Benevolent Society, supra;* 5 RULING CASE LAW 378. This theory, like the trust fund theory, is open to so much criticism that it can hardly be said to offer a satisfactory basis for the exemption.

The "implied assent theory" announces that the one who accepts the benefit of a charity impliedly assumes the risk of injuries due to negligence of his benefactor's agents. As stated in *Powers* v. *Mass. Homeopathic Hospital,* 109 Fed. 294, 65 L. R. A. 372, the beneficiary of such a charitable trust enters into a contract whereby he assumes the risk of the kind of torts under discussion. This theory is adopted in *Bruce* v. *Central Methodist Episcopal Church, supra; Adams* v. *University Hospital,* 122 Mo. App. 675; *Schloendorff* v. *Society of N. Y. Hospital,* 211 N. Y. 125, 52 L. R. A. (N.S.) 505. A view of the more recent cases shows that this is coming to be the prevailing basis of decision, and it is believed that when it is not unduly extended in its application it is sound. It is only when this theory is applied to those

who actually paid full compensation for the services received that the reasoning breaks down, for the plaintiff is not then the recipient of charity and cannot be logically said to have waived any right. The California court has apparently failed to distinguish between the cases of pay and charity patients. In *Burdell et ux.* v. *St. Luke's Hospital,* (Cal., 1918), 173 Pac. 1008, the decision is based upon the implied assent theory, but the court goes on to say, "The fact that plaintiff paid the regular rates charged by the hospital for paying patients does not take the case out of the operation of this rule, for it is apparent that the rates were not charged with a view of making a profit from her." Also, in *Duncan* v. *Nebraska Sanitarium,* 92 Neb. 162, 41 L. R. A. (N.S.) 973, the court says, by way of *dictum,* that the rule applies equally to those who have paid full compensation. The Georgia Court takes the opposite view, but limits the recovery to funds derived strictly from non-charitable pay patients. *Morton* v. *Savannah Hospital,* (Ga., 1918), 96 S. E. 887. In *Tucker* v. *Mobile Infirmary Ass'n., supra,* the patient paid full rates, and the court expressly reserved the question of a charity patient until it should arise. In the *Diakonniessenverein Case,* the court used language broad enough to include charity patients, but as that question was not before the court, its remarks in this regard are simply *dictum.* Modern tendency seems to lean toward basing the exemption upon the contractual relation which arises by reason of the giving and receiving of charity, and this, it is submitted, represents the correct logical basis for the decisions.

L. H. M.